

SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Rail v Amaca and Ors (No 2)* [2011] QSC 317

PARTIES: **QUEENSLAND RAIL**
(Plaintiff)
v
AMACA PTY LTD ACN 000 035 512
(First Defendant)
and
AMABA PTY LTD ACN 000 387 342
(Second Defendant)
and
WALLABY GRIP LIMITED
(Third Defendant)
and
**WALLABY GRIP (B.A.E.) PTY LTD (IN
LIQUIDATION) ACN 008 453 325**
(Fourth Defendant)
and
SELTSAM PTY LIMITED ACN 000 003 734
(Fifth Defendant)
and
CRS LIMITED ACN 000 001 276
(Sixth Defendant)

FILE NO/S: BS2162 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 28 October 2011

DELIVERED AT: Brisbane

HEARING DATE: 9 September 2011, 5 October 2011

JUDGE: Boddice J

ORDER:

1. **The costs of the plaintiff's application be reserved to the trial judge;**
2. **The third and fourth defendants pay the plaintiff's costs of and incidental to the defendants' application for leave to file and serve further amended defences, and**
3. **The third and fourth defendants pay the plaintiff's costs thrown away by the amendments.**

CATCHWORDS: PROCEDURE – COSTS – INTERLOCUTORY PROCEEDINGS – COSTS RESERVED – where no final

decision has yet been made as to the correctness of the plaintiff's contentions – whether the costs of the plaintiff's summary judgment application should be reserved

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – where the defendants had previously amended their defences – whether the third and fourth defendants should be ordered to pay the plaintiff's costs of and incidental to the applications for leave to file and serve further amended defences – whether the third and fourth defendants should be ordered to pay the plaintiff's costs thrown away by the amendments

Uniform Civil Procedure Rules 1999 (Qld)
Oshlack v Richmond River Council (1998) 193 CLR 72
State of Qld v Nixon & Ors [2002] QSC 296

COUNSEL: R Morton for the plaintiff
 D G Russell QC with G O'Driscoll for the third and fourth defendants

SOLICITORS: Moray & Agnew Lawyers for the plaintiff
 Middletons for the 3rd and 4th defendants

- [1] On 5 October 2011, I ordered that the plaintiff's application be dismissed, and that the third and fourth defendants' applications be allowed. The defendants were granted leave to file and serve the third further amended defences. I invited counsel to make submissions as to costs. Written submissions have been filed by the plaintiff and the third and fourth defendants.

Submissions

- [2] The plaintiff submits the appropriate costs orders are that the costs of the plaintiff's application be reserved to the trial judge, and that the third and fourth defendants be ordered to pay the plaintiff's costs of and incidental to the applications for leave to file and serve further amended defences, and the plaintiff's costs thrown away by the amendments.
- [3] The submission as to the costs of the plaintiff's application is made on the basis that no final decision has yet been made as to the correctness of the plaintiff's contentions. As the plaintiff's position may ultimately be shown to be correct, the trial judge will be in a better position to justly decide which party should bear the costs of the application.
- [4] The submission as to the costs of the third and fourth defendants' applications is made on the basis the defendants sought an indulgence from the court. Further, r 386 of the *Uniform Civil Procedure Rules 1999 (Qld)* provides that the party making the amendment pays the costs thrown away by reason of the amendment, unless the court orders otherwise.

- [5] The third and fourth defendants submit the appropriate orders as to costs are that costs should follow the event.¹ They contend:
1. The defendants were successful in their defence of the plaintiff's strikeout application, and in their application for leave to amend.
 2. Rule 681 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that the costs of a proceeding, including an application in the proceeding, are in the discretion of the court but follow the event unless the court orders otherwise.
 3. There is no reason to depart from this principle, and fairness dictates that the unsuccessful party should bear the liability for the costs of the unsuccessful litigation.²
 4. The plaintiff's strikeout application was problematic.
 5. Whilst the defendants sought an indulgence in applying to the court for leave to amend, the counterclaim was based on the same core factual matter as had been in the pleadings since 2008, and any delay in pleading was explicable.
 6. The plaintiff could have consented, but declined to consent, to the defendants' request to amend their defence.

Discussion

- [6] The awarding of costs is discretionary. There are many circumstances to be weighed in the exercise of that discretion. In *Oshlack v Richmond River Council*, McHugh J, in the context of a discussion about the basis on which costs are awarded and the statutory power to award costs said –

“Although the discretion is broadly stated, it is not unqualified. It clearly cannot be exercised capriciously. Importantly, the discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation... By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. The successful litigant is generally entitled to an award of costs.”

Plaintiff's application

- [7] Resolution of costs in summary judgment applications involves consideration of all of the circumstances. Such an application may fail even though that applicant has good prospects of ultimately succeeding in the action. The party seeking to resist the application may rely on evidence which may not be accepted on the final hearing, and the applicant may be obliged to proceed on the basis that the respondent's version of the facts be accepted for the purposes of the application.³

¹ *Uniform Civil Procedure Rules 1999* (QLD) r 689(1).

² *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97.

³ *State of Qld v Nixon & Ors* [2002] QSC 296 at [6].

- [8] Considerations such as these may justify a conclusion that the appropriate costs order, in the circumstances, is that the costs of a summary judgment application be reserved or made the parties' costs in the cause. It is otherwise where it appears, for example, that the applicant for summary judgment ought reasonably to have appreciated that the application would fail or is applying primarily with a view to securing a forensic advantage.⁴
- [9] Whilst there is an argument that the costs of the application are discrete, and appropriately to be determined adversely to the plaintiff, the issues, the subject of the application are not finally determined. It is appropriate that the costs of the plaintiff's application await the determination of the final proceedings. The costs of the plaintiff's application are reserved to the trial judge.

Third and fourth defendants' application

- [10] The defendants' application involved seeking leave to amend to add a counterclaim. This proceeding has been on foot for some time. The defendants had previously amended their defences. The proposed amendment was contentious and involved consideration of whether a fair trial could be held. In the circumstances, it was not unreasonable the plaintiff opposed the granting of leave.
- [11] The defendants' should bear the costs of the applications for leave, and the costs thrown away by reason of the amendments.

Orders

1. The costs of the plaintiff's application be reserved to the trial judge;
2. The third and fourth defendants pay the plaintiff's costs of and incidental to the defendants' application for leave to file and serve further amended defences, and
3. The third and fourth defendants pay the plaintiff's costs thrown away by the amendments.

⁴ *State of Qld v Nixon & Ors* [2002] QSC 296 at [7].